ORIGINAL

Supreme Court, U. S.
FILED
MAY 15 1980
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1979

No. 79-1601

GEORGE SUMNER, WARDEN,
Petitioner,
v.
ROBERT MATA,
Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, Robert Mata, by and through his counsel, asks leave to file the attached Respondent's Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of California without prepayment of costs and to proceed in forma pauperis pursuant to Rule 53.

The affidavit of Respondent in support of this motion is attached hereto.

May 13, 1980

Ezra Hendon

EZRA HENDON
Deputy State Public Defender

Counsel for Respondent

EH:smc

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1601

GEORGE SUMNER, Petitioner

v.

ROBERT MATA

AFFIDAVIT

I, ROBERT MATA, being first duly sworn according to law, depose and say, in support of my motion for leave to proceed without being required to prepay costs or fees: 1. I am the petitioner in the above-entitled case. 2. Because of my poverty I am unable to pay the costs of said cause. 3. I am unable to give security for the same. 4. I believe that I am entitled to the redress I seek in said case. 5. The nature of said cause is briefly stated as follows:

On July 4, 1973, I was sentenced to life imprisonment for first degree murder in the Superior Court of California, County of Kern. A petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging that conviction was subsequently filed in the United States District Court for the Northern District of California. That petition was granted on appeal by the United States Court of Appeals for the Ninth Circuit on the ground that the conviction was based on the use of unconstitutional identification procedures.

Robert Mata
ROBERT MATA

Duly witnessed and sworn to
before me, a Notary Public,
this 13th day of May, 1980.

Eleanor S. Gerould
Notary Public

ELEANOR S. GEROULD
NOTARY PUBLIC - CALIFORNIA
CITY & COUNTY OF SAN FRANCISCO
My Commission Expires Oct. 19, 1980

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GEORGE SUMNER, WARDEN,

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

QUIN DENVIR
State Public Defender

CLIFTON R. JEFFERS
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ON PETITION FOR A WRIT OF CERTIORARI TO THE
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RESPONDENT'S BRIEF IN OPPOSITION

The respondent Robert Mata respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 611 F.2d 754.

JURISDICTION

Respondent accepts petitioner's statement of jurisdiction in this case.

QUESTIONS PRESENTED

1. In a case in which a state prisoner seeking federal habeas corpus relief has twice presented the ground on which he seeks relief to all available state courts and those state courts have twice decided the issue raised, can it be said that the petitioner has failed to exhaust available state remedies, as is required by 28 U.S.C. § 2254 (b) and (c)?

2. When in deciding that the admission of identification testimony obtained through the use of flagrantly suggestive identification procedures has deprived a criminal defendant of due process of law, a federal court of appeal has cited and applied the legal standard approved by this Court for the disposition of such questions, should this Court grant certiorari to review the lower court's factual determination that a substantial likelihood of irrevocable misidentification existed in this particular case?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts petitioner's statement of the provisions relevant to this case.

STATEMENT OF THE CASE

Respondent accepts petitioner's description of the procedural history of the case. Respondent offers the following statement of facts relevant to the due process issue raised in this case:

This case involved a homicide at the medium security prison, C.C.I., Tehachapi, California, on October 19, 1972. The prosecution's case was based chiefly on the theory that the homicide was a result of feuding between opposing prison factions. It was alleged that within the California Prison System there existed two such factions -- the "Mexican Mafia" and the "Nuestra Family". The homicide victim, Leonard Arias, was alleged to have been a member of the "Nuestra Family". It was alleged that prior to being transferred to Tehachapi, Mr. Arias had attacked a member of the "Mexican Mafia" while incarcerated at San Quentin. It was further alleged that as a result of this attack the "Mexican Mafia" had put a "contract" out on the life of Mr. Arias. On October 19, 1972, the day after his arrival at Tehachapi, Mr. Arias was stabbed and killed.

The prosecution alleged that Respondent Robert Mata and co-defendants David Gallegos and Salvador Vargas (hereinafter referred to as "Respondent", "Gallegos" and "Vargas", or collectively as "defendants") were members of the "Mexican Mafia" and charged them with the homicide. At trial, the prosecution's case rested on the testimony of three inmates, Rigoberto Almengor, Florence J. Allen and Paul Childress, alleged eyewitnesses to the homicide.

On October 19, 1972, soon after the homicide, Almengor was shown several hundred photographs of inmates by prison officials (RT 422).[1/] He selected four photos, making a positive identification of Pete Nunez as the person who did the stabbing (RT 420, 733) and tentatively identifying inmates Ramirez, Reymundo, and Vargas as the other assailants (RT 734). He did not identify Respondent Mata as a participant (RT 712). He then changed his "positive" identification of Nunez when prison authorities told him that Nunez had been outside the prison on the day of the killing (RT 433, 713).

One week later, on October 27, Almengor and Allen were shown 24 photos of inmates, including photos of the three defendants (RT 714, 720, Exhibit 23). Six of the photos dated as far back as 1964 to 1970, while those of the defendants had been taken in February, March and July of 1972 (RT 917, 918). Allen was unable to make any identification, stating that he didn't get a good enough look at the assailants (RT 720, 721). Almengor did not identify Respondent Mata. He stated that the group of photos was old and asked to see some recent ones (RT 715).

After Almengor's request, a series of updated photos was taken, and although none of the photos turned out, only those of the three defendants were taken a second

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1. RT refers to the Reporter's Transcript at Respondent's state court trial.

time (RT 759). Moreover, when taking the defendants to be photographed, they were led out of the segregation unit in partial view of Almengor and Allen.[2/]

On October 30, 1972, Almengor and Allen were shown fifteen photos of inmates, nine fewer than on October 27 (RT 718). The only updated photos included were those of the three defendants (RT 754). Not included in the group of fifteen photos were the ones of Ramirez, Reymundo and Nunez (RT 925), a significant fact because Almengor had identified them as the perpetrators of the homicide when shown photos on October 19. As Petitioner effectively conceded in the District Court, the reason for this exclusion was that the state considered Almengor's original identification "wrong" since it did not concur with the state's choice of suspects (Respondent's Return p. 9). The photos were thus removed to facilitate "court" identification by Almengor and Allen in future lineups.

Almengor previously had described the assailants as wearing mustaches (RT 970) and Almengor and Allen knew that new pictures of the suspects had been taken (RT 444, 446, 1119). When prison officials showed Almengor and Allen the photo lineup on October 30 it contained only three new photos, those of Respondent Mata, and Gallegos and Vargas (RT 754). Each of these three suspects was posed identically, wearing prison clothes and with a placard hanging around his neck. Each wore a mustache, though none of the other inmates dressed in prison clothing did (Exhibit 24). From these fifteen photos, Almengor selected those of the three defendants (RT 718). Prior to this time, he had never identified

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2. Almengor testified that he saw "three persons" being led out and knew they were going to have updated photos taken (RT 444, 446). Allen could see them well enough to later recognize them from photos (RT 119).

Respondent Mata (RT 475). Allen also selected the photos of the three defendants, including Respondent Mata (RT 722).

Shortly after the killing, prison officials had discovered bloody clothing belonging to Almengor, which he had hidden (RT 385, 386, 764). He was informed that he was a suspect (RT 465, 764), and consequently was under pressure to make identifications and prove that he was not involved (RT 466). Secondly, throughout the entire investigation, Almengor insisted that he could not make a positive identification from photographs. He maintained that he could not make a positive identification unless he saw the persons in a lineup (RT 437, 438, 712, 740). Despite his repeated requests for a lineup (RT 457, 496, 781, 783, 932, 959), none was ever provided as it would have required the constitutional safeguard of an attorney's presence (RT 701).

Prior to October 30, inmate Allen expressed similar doubts about his ability to identify the assailants. On several occasions, including October 19 and 27, Allen told investigating officers that he didn't see the assailants well enough to identify them from either photographs or a lineup. (RT 630, 720, 721, 924.) Allen testified that the California Department of Corrections had reminded him of his upcoming parole date and had threatened to transfer him to another institution where his life would be in danger if he did not testify. (Preliminary transcript 188-89.) He stated that his main thought throughout the identification procedure was keeping himself alive. (Preliminary transcript 197.)

On November 22, 1972, Allen told Mr. Faulkner, private investigator for the defendants, that:

(1) the incident lasted only a few seconds and he didn't get a good enough look at the assailants to identify them (RT 1118);

(2) throughout the investigation by the Sheriff's Department and the Department of Corrections he maintained that he could not identify the assailants and would take a lie detector test to substantiate it (RT 1118);

(3) he identified the defendants because he saw them being taken out of segregation to have photos taken; that they were the only persons from segregation whose photos were on the chart; and that he assumed they must be the ones that did it (RT 1119);

(4) he was under pressure from the Department of Corrections to make an identification as he was coming up for parole (RT 1119).

REASONS WHY THE WRIT SHOULD BE DENIED

Petitioner claims that the present case presents two issues worthy of this Court's attention, one concerning the exhaustion procedures required under 28 U.S.C. § 2254, one concerning the legal standards to be applied to claims of constitutional inadmissibility of eyewitness identification testimony. The procedural claim is patently without merit. As to the constitutional issue, an examination of the Ninth Circuit's opinion reveals that the Court of Appeals applied the legal standard that this Court recently has approved for the measuring of such claims: that eyewitness testimony is to be admitted unless obtained by procedures so suggestive as to raise a very substantial likelihood of irreparable misidentification. 611 F.2d at 758, citing Manson v. Braithwaite, 432 U.S. 98 (1977); Neil v. Biggers, 409 U.S. 188 (1972). The only question actually raised by the present case is an extremely narrow one -- i.e., in its application of an appropriate legal standard to a particular set of facts, did the Court of Appeals reach a correct result? Respondent

asserts that the Court did, and furthermore that this fact-intensive question is not of sufficient significance to merit review by this Court.

A. Respondent Plainly Exhausted His State Judicial Remedies as Required by 28 U.S.C. 2254.

Respondent's claim that his conviction was based upon the unconstitutional use of impermissibly suggestive identification procedures was twice presented and twice decided on its merits by the California state courts: once on direct appeal to the California District Court of Appeal;[3] and for a second time on a state writ of habeas corpus denied on its merits by the state Superior Court, Court of Appeal, and Supreme Court.[4] Thus, unlike Wainwright v. Sykes, 433 U.S. 72 (1977), in which the constitutional issue raised by petitioner on federal habeas corpus had never been passed on by the state courts, respondent did exhaust all available state court remedies, as required by 28 U.S.C. § 2254(b) and (c), and the federal appellate court so ruled. 611 F.2d at 755.

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3. See the opinion in People v. Vargas, et al., 5 Crim. 1735, issued August 4, 1975 by the California Court of Appeal, First Appellate District, attached to petitioner's certiorari application as Appendix C.

4. As the United States District Court stated in its opinion in this case: "'While that petition was denied without opinion, for purposes of habeas corpus review it is assumed that the state court addressed the merits of the petition.' Thompson v. Procunier, 539 F.2d 26, 28 (9th Cir. 1976)." See Petitioner's certiorari application, Appendix D2.

B. The Ninth Circuit Employed an Appropriate Legal Standard in its Decision Below, And its Determination on the Unique Facts of This Case that Respondent's Due Process Rights Had Been Violated is Both Correct and of Insufficient Importance to Merit This Court's Review.

Petitioner asks this Court to grant a writ of certiorari to determine whether the Ninth Circuit was correct in excluding identification testimony on the ground that the procedures by which it was obtained were unnecessary as well as unreliable. Had the Court of Appeals truly rested its holding that the evidence should have been excluded from Respondent's state court trial on its finding of a lack of necessity for the identification procedures employed, petitioner's certiorari application might present some merit. For while this Court has consistently discussed the issue of the necessity for the use of a given identification procedure in determining the constitutionality of that procedure,[5/] it recently ruled that identification evidence may be admissible, even if obtained through unnecessarily suggestive procedures, if "the out-of-court identification possesses certain features of reliability." Manson v. Brathwaite, 432 U.S. 98, 110 (1977). Even a cursory examination of the Ninth Circuit's opinion, however, reveals that the Court of Appeals applied this precise teaching of Manson v. Brathwaite; petitioner's argument concerning the issue of "necessity" is thus a shoddily-constructed straw man.

In beginning its analysis, the Ninth Circuit stated that an identification procedure is violative of due process when it is unnecessarily suggestive and conducive to irreparable mistaken identification. Mata v. Sumner, supra, 611 F.2d at 757. The Court went on to emphasize that ". . . lack

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5. See Manson v. Brathwaite, 432 U.S. 98, 110 (1977); Neil v. Biggers, 409 U.S. 188 (1972); Simmons v. United States, 390 U.S. 377 (1968); Stovall v. Denno, 388 U.S. 293 (1967).

of necessity is not a per se ground for rejection of the identification," citing United States v. Valdivia, 492 F.2d 199, 210 (9th Cir. 1973), cert. denied, 416 U.S. 940 (1974). While "necessity is an important factor to be considered in judging the validity of the identification procedures," the Court of Appeals reiterated the adjuration of Manson v. Brathwaite that: "Unnecessary suggestability alone does not require exclusion of the subsequent identification." 611 F.2d at 758.

> "'It is the likelihood of misidentification which violates a defendant's right to due process . . . .' Neil v. Biggers, 409 U.S. 188, 198, 93 S.Ct. 375, 381-382, 34 L.Ed.2d 401 (1972). In other terms, 'the focus is on the reliability of the witnesses' identification rather than on the flaws in the pretrial identification procedures.' United States v. Barron, 575 F.2d 752, 754 (9th Cir. 1978)." 611 F.2d at 758. (Emphasis added.)

The Court of Appeals analyzed critical issues such as the witnesses' opportunity to view the assailants, the degree of attention afforded them, the accuracy of their descriptions, and the witnesses' level of certainty.[6/] Id. All of these factors are to be considered under Manson and Neil. Furthermore, eleven days intervened between the Arias killing and the identification made by Allen and Almengor through the use of impermissibly suggestive procedures. Thus there is herein present the troubling factor of a significant passage of time between the crime and the confrontation that did not occur in Manson v. Brathwaite. 432 U.S. at 115-16.

It was upon these factors that the Court rested its finding that "the photographic identification procedure was so

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6. See, e.g., the Court's comments concerning witnesses Almengor and Allen: "Here, Almengor was not merely 'equivocal' on the first selection. He selected photos of three individuals whom the prosecution asserts were not involved at all. Allen said he would not look at the photos because he said he could not make an identification." 611 F.2d at 758.

impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." 611 F.2d at 759. It seems obvious that the Court of Appeals reversed Respondent's conviction not because it believed that state officials used procedures less desirable than others readily available, but because it found that the procedures used produced identification testimony so unreliable as to raise the specter that an innocent man had been misidentified.

Petitioner's objection appears to rest on the fact that the Ninth Circuit's opinion contains any discussion of "necessity" whatsoever. The Court did make a finding "that there was no necessity here to use photographic identification procedures" as opposed to an in-person lineup. While lack of necessity for a given set of identification procedures cannot invalidate testimony acquired by their use, necessity for the employment of such procedures can serve as their constitutional justification. See Simmons, supra, 390 U.S. at 385; Stovall v. Denno, 388 U.S. 293, 201-02 (1967). Hence necessity for the use of certain procedures or its absence is always an appropriate threshold issue to be discussed and disposed of, for so doing may obviate the need to determine whether those procedures gave rise to a substantial likelihood of misidentification.

Furthermore, a unique fact of the present case gave the use of a photographic spread rather than an in-person lineup added significance. Witness Almengor had insisted to prison officials that he could not make an accurate identification from photographs, but only from an in-person lineup (RT 437, 438, 712, 740). In view of that statement, the use of photographs rather than an in-person lineup was a factor going to the reliability of any subsequent identification made from photographs by Almengor, and hence was an

appropriate element to be considered in determining the likelihood of an "irreparable misidentification" by him. Thus the fact that the Ninth Circuit discussed the lack of necessity for the use of a photo spread indicates no deviation from the lesson of Simmons, Neil v. Biggers, and Manson v. Brathwaite that only the substantial threat of misidentification can bar the admission of identification testimony.

It is worthy of note that Petitioner concedes that the same analysis applied in this case has been used by the Ninth Circuit in numerous recent cases. United States v. Crawford, 576 F.2d 794, 797 (9th Cir. 1978), cert. denied 439 U.S. 851 (1978); United States v. Pheaster, 544 F.2d 353, 370 (9th Cir. 1976), cert. denied 429 U.S. 1099 (1977); United States v. Calhoun, 542 F.2d 1094, 1104 (9th Cir. 1976), cert. denied 429 U.S. 1064; United States v. Valdivia, supra. In all four of these cases, identification testimony was deemed admissible over objection that it was obtained through unnecessarily suggestive procedures. In Crawford, Calhoun, and Valdivia, the Ninth Circuit so ruled despite finding the procedures used to have been unnecessary. Thus the Ninth Circuit standard employed in the present case, as in these other four, has not led to any undue emphasis on the issue of necessity, or deviation from the core question of reliability. Perhaps it is for that reason that this Court declined to review the Ninth Circuit's rulings in Crawford, Calhoun, Pheaster, and Valdivia.

Given this consistent refusal of the Ninth Circuit to bar the admission of eyewitness identification because the procedures used to obtain it were unnecessary, there is no meaningful conflict between its holdings and that of United States v. Gidley, 527 F.2d 1345 (5th Cir.), cert. denied 429

U.S. 841 (1976), which held that the availability of less suggestive methods of identification is "not relevant" in determining whether a photographic display is impermissibly suggestive. Id., at 1350. The fact is that in no case -- including the present one -- has the Ninth Circuit applied the concept of unavailability in other than a threshold way or as a factor tending to prove suggestibility. See, e.g., United States v. Crawford, supra, 576 F.2d at 797-98. The Ninth Circuit's use of necessity as a consideration in identification cases is therefore wholly without doctrinal or practical significance. Not a single case in the Ninth Circuit has ever turned on whether identification procedures were unnecessary and surely the present case did not. The discussion of necessity below consumed only a very small part of the Court's discussion and any fair reading of the entire opinion makes plain that lack of necessity did not form the sole or main basis for the Court's decision.

Under these circumstances any differences between the Ninth and Fifth Circuits on this question are demonstrably without practical consequence. To the extent that any conflict in the circuits exists at all, therefore, it is essentially semantic and not one which requires the time or attention of this Court. For the Ninth Circuit has shown itself quite willing to affirm convictions even when particular identification procedures are unnecessary.

The Ninth Circuit plainly applied the correct legal standards in this case; Petitioner's true complaint is that, in Petitioner's opinion, the Court of Appeals' application of the right legal standard produced the wrong result. Such a claim is equally apposite in every case where a state or federal appellate court must decide a constitutional issue

presenting a mixed question of fact and law.[8] Were the United States Supreme Court to attempt to review such rulings as a matter of course, its workings rapidly would grind to a halt. It is for that reason that the Court limits its case-load to those matters raising important questions of law, of which this case presents none. Petitioner's petition for a writ of certiorari should be denied.

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CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

DATED: May 13, 1980

Respectfully submitted,

QUIN DENVIR
State Public Defender

CLIFTON R. JEFFERS
Chief Assistant
State Public Defender

EZRA HENDON
Deputy State Public Defender

DENNIS P. RIORDAN
Deputy State Public Defender

UNITED STATES SUPREME COURT

OCTOBER TERM 1979

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Petitioner,	)
	)
v.	)
	)
ROBERT MATA,	)
	)
Respondent.	)
	)

CERTIFICATE OF SERVICE BY MAIL

EZRA HENDON, a member of the Bar of the Supreme Court of the United States, states:

That his business address is 1390 Market Street, Suite 425 in the City and County of San Francisco, State of California; that on May 13, 1980, he served a true copy of the attached Respondent's Brief in Opposition to Petition for Writ of Certiorari on each of the following, by placing same in envelopes addressed respectively as follows:

George M. Deukmejian
California Attorney General
6000 State Building
San Francisco, California 94102

Clerk, U.S. District of Northern California
U.S. Courthouse
P.O. Box 36060
San Francisco, California 94102
(Your No. 77-2801)

Clerk, U.S. Court of Appeals of the Ninth Circuit
P.O. Box 547
Seventh & Mission Streets
San Francisco, California 94101
(Your No. 78-2636)

Said envelopes were then sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

Ezra Hendon
EZRA HENDON